

Supreme Court, U. S.

FILED

JUL 20 1978

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court of the  
United States**

October Term, 1977

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NO. 77-1759

THE M. J. KELLEY COMPANY AND  
THE PEERLESS INSURANCE COMPANY,  
*Petitioners,*

v.

CIPRA, INC.,  
*Respondent.*

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ON A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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BRIEF OF RESPONDENT CIPRA, INC.,  
IN OPPOSITION TO PETITION  
FOR CERTIORARI

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Cipra, Inc., respondent, herein referred to as CIPRA, opposes the petition for certiorari in this matter, on the ground there are no special or important reasons this diversity case should be reviewed by this Court.

## QUESTION PRESENTED

The true question before the Court is whether, in a diversity of citizenship case, under 28 U.S.C. § 1332, involving claims for breach of a second-tier subcontract arrangement on a construction job, this Court should review the lower court's application of a general rule of construction and interpretation of ambiguous and indefinite contracts, that the conduct of the parties relating to the subject matter of the contract before any controversy arose between them, is one of the best indications of the true intent of the parties.

## STATUTE INVOLVED

Respondent submits the federal court jurisdiction in this case is based solely upon 28 U.S.C. § 1332(a), diversity of citizenship; and that the Miller Act, 40 U.S.C. § 270a et seq., referred to in the Petition, is not involved in this case.

28 U.S.C. § 1332 provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

## STATEMENT OF THE CASE

The action involves disputes between the mechanical subcontractor Kelley, and its sub-subcontractor, CIPRA, relating to part of the construction of a United States Post Office bulk mail center, Commerce City, Colorado. The prime contractor, Wright-Dick-Boeing, and its Miller Act surety, were not parties to the action.

Kelley commenced the action in the United States District Court for Colorado, as a diversity case, under 28 U.S.C. § 1332, seeking damages for alleged breach by CIPRA of the second-tier subcontract. CIPRA denied liability, and counterclaimed, basing jurisdiction solely on 28 U.S.C. § 1332, diversity, against Kelley and joined Kelley's surety, Peerless Insurance Company, claiming for labor and material furnished by CIPRA under the sub-subcontract arrangement and for extras. CIPRA had Miller Act (40 U.S.C. § 270a et seq.) rights against the prime contractor Wright-Dick-Boeing, and its Miller Act surety, since CIPRA had a "direct contractual relationship with a subcontractor [Kelley] but no contractual relationship, express or implied, with the contractor furnishing said payment bond . . ." (40 U.S.C. § 270b(a)). CIPRA did not institute suit in this action as required by the Miller Act, "in the name of the United States for the use of . . ." CIPRA. No such Miller Act suit was ever commenced by CIPRA, and CIPRA's Miller Act rights are now time barred, since more than one year has expired since the last labor was performed or material supplied by CIPRA.

The case was tried to the Court, which found the second-tier subcontract arrangement was controlled by a contract of August 13, 1973, a letter of September 6, 1973, an additional contract of November 4, 1973, and by purchase orders issued by Kelley for "extras" performed by CIPRA. CIPRA billed Kelley as work progressed, but

Kelley failed to pay monthly as required by the contractual arrangement, and Kelley was in arrears in paying CIPRA in the sum of \$155,681.49. After demands by CIPRA that payments be brought current, negotiations, and notice, CIPRA withdrew its work forces, and the sub-subcontract was terminated. On the basis of all the evidence, the trial court found that Kelley had breached the contractual arrangements, that \$155,681.49 plus interest was due CIPRA from Kelley, for which Peerless as surety for Kelley was jointly and severally liable, and entered judgment in favor of CIPRA against both for the sum of \$178,327.68.

In construing the ambiguities existing in the contractual arrangement as to billing rate for extras, and whether billings by CIPRA for an on-the-job foreman were proper, as well as Kelley's contention at trial of erroneous and inadvertent early payments of CIPRA's billings, the trial court considered the conduct and transactions of Kelley and CIPRA before any controversy arose. While the trial court placed much reliance on this course of conduct in determining the true intent and meaning of the contractual arrangement, it did not find or rule that Kelley's "course of conduct" in paying early invoices of CIPRA before dispute, precluded or stopped Kelley from disputing billings of CIPRA. Rather the trial court found (Appendix to Petition - 21):

The repeated payments made under the contract prior to the dispute here are highly persuasive of the acceptance by Kelley of CIPRA's interpretation of the contract. Such a course of dealing has great force in interpreting the contract and has been considered by the court in reaching its conclusions. We find that the course of dealing demonstrates a clear agreement by the parties as to the terms of the contract and is evidence of what was contemplated by the contract. A

later attempt by Kelley to vary the procedures is in derogation of the contract and constitutes wrongful breach. Although not determinative, the fact that Kelley has presented the instant billings of defendant to the main contractor, Wright-Dick-Boeing, in their entirety, serves to underscore our findings that the claims are legitimate.

The United States Court of Appeals for the Tenth Circuit affirmed, holding the trial court's findings of fact were supported by the record. The Tenth Circuit specifically stated (Appendix to Petition - 12 and 13):

The trial court properly considered the transactions which took place before the breach as part of the conduct of the parties to evaluate the contentions of error and inadvertence advanced by Kelley. The court also properly used this information in its construction of the letter and the agreements. In *Hensel Phelps Const. Co. v. United States*, 413 F.2d 701 (10th Cir.), a Miller Act case, we referred to correspondence between the parties, and said:

' . . . This evidence was pertinent because if the contract is not clear the conduct of the parties is given great weight in construing it (Citing cases).'

See also *United States v. Cross*, 477 F.2d 317 (10th Cir.); *Whitebird v. Eagle-Picher Co.*, 390 F.2d 831 (10th Cir.).

Neither the trial court nor the Tenth Circuit Court of Appeals ruled that the prior course of conduct amounted to waiver or worked an estoppel and no issue in this regard, nor a request to enunciate federal substantive contract law, was presented to the lower courts by the petitioners.

## ARGUMENT

1. THIS IS A DIVERSITY OF CITIZENSHIP CASE, AND IS NOT A MILLER ACT CASE, AND THE REASONS PETITIONERS URGE FOR REVIEW DO NOT APPLY TO THIS CASE.

Petitioners recognize, in their statement of the case at page 2 of the Petition, that Kelley's original action was a diversity case, jurisdictionally based on 28 U.S.C. § 1332, but mistakenly contend that CIPRA's counterclaim was premised upon the Miller Act, 40 U.S.C. § 270 a(b).

There is no requirement in the Miller Act that a subcontractor such as Kelley, on a public building or public work of the United States, furnish performance or payment bonds. The Miller Act requirements apply only to the principal contractor, which in this case is Wright-Dick-Boeing. 40 U.S.C. § 270b(a) grants a second-tier subcontractor, such as CIPRA, a conditional right of action on the Miller Act bond of the prime contractor. The second-tier subcontractor's right is conditioned by the Miller Act upon giving timely notice of claim and timely commencing suit in the name of the United States within one year. There is no provision in the Miller Act making the suit against the prime contractor's Miller Act bond the exclusive remedy of a second-tier subcontractor.

Here, CIPRA elected to sue Kelley, and to sue Kelley's surety, Peerless, rather than to pursue the Miller Act action available to it.

In this non-Miller Act case, petitioner urges the case involves the Miller Act, in an attempt to bootstrap the case within the considerations governing review on certiorari set forth in Rule 19 of the Supreme Court rules.

This Court, in a Miller Act action, *F. D. Rich Co., v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 127 (1974), stated:

The Miller Act Provides a federal cause of action, and the scope of the remedy as well as the substance of the right created thereby is a matter of federal not state law.

There is no indication that the rule announced in the *Rich* case is intended to apply to non-Miller Act, diversity of citizenship cases in the federal courts arising out of construction contract disputes. Rather, the rule to be applied in diversity cases such as this one, is stated in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938).

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

The circuit courts have recognized that there is some question as to whether federal substantive law controls over state law in Miller Act cases. *United States ex rel. Building Rentals Corp. v. Western Casualty & Surety Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974); *Burgess Construction Co. v. M. Morrin & Son Co.*, 526 F.2d 108, 114 n.2 (10th Cir. 1975). It is submitted resolution of that question by this Court should be made in a Miller Act action, and does not justify review of this diversity case by this Court.

II. THE LOWER COURTS IN THIS CASE APPLIED THE GENERAL PRINCIPLE OF LAW, APPLIED IN COLORADO COURTS AND ELSEWHERE, THAT IN THE CONSTRUCTION AND INTERPRETATION OF AMBIGUOUS AND INDEFINITE CONTRACTS, THE INTERPRETATION BY THE PARTIES TO THE CONTRACT, AS SHOWN BY THEIR CONDUCT RELATING TO THE SUBJECT MATTER BEFORE ANY CON-

TROVERSY AROSE BETWEEN THEM, IS ONE OF THE BEST INDICATIONS OF THE TRUE INTENT OF THE PARTIES; AND, THE APPLICATION OF THAT PRINCIPLE OF LAW IN THIS DIVERSITY CASE DOES NOT WARRANT REVIEW BY THIS COURT.

The memorandum opinion and order of the trial court, and the opinion of the United States Court of Appeals for the Tenth Circuit are set forth in the Appendix A (pp. 10-25) of the Petition herein. It is clear the lower court considered the transactions between the parties under the contract arrangement before disputes in construing the agreement and letter arrangement, and in resolving the ambiguity as to the rates for billing of extras and whether billings for an on-the-job foreman were proper, as well as evaluating Kelley's contention at trial that it erroneously and inadvertently paid CIPRA's early bills.

There was ambiguity as to the billing rate for extras, because of conflict in the language of the August 13, 1973, subcontract (Petition Appendix - 37-46) in paragraph 7 and article 15; and in the letter agreement of September 6, 1973 (Petition Appendix - 55-56). There was ambiguity as to whether the word "supervision" in the items included in the rate per labor hour in paragraph 2 of the agreement of August 13, 1973, included an on-the-job foreman.

The Colorado courts recognize and apply this general principle of law in construction and interpretation of ambiguous contracts. *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962); *Cohen v. Clayton Coal Co.*, 86 Colo. 270, 281 P. 111 (1929). The Tenth Circuit has applied the rule in Miller Act cases, such as *Hensel Phelps Construction Co. v. United States*, 413 F.2d 701 (10th Cir. 1969), and non-Miller Act cases, *United States v. Cross*, 477 F.2d 317 (10th Cir. 1973); *Whitebird v. Eagle-Picher Co.*, 390 F.2d 831 (10th Cir. 1968). This rule

is supported and enunciated in the general authorities, including Restatement of the Law of Contracts, § 235(e) (1932), and 3 Corbin, Contracts, § 558 (1968).

In this diversity case, the trial was to the court without a jury and the court made findings of fact on the basis of all the evidence, including the conduct of the parties, upon which it placed much reliance. The Tenth Circuit Court of Appeals affirmed, holding the trial court's findings of fact were supported by the record.

Petitioners, by their Petition in this Court, misconstrue and misstate the lower court's findings and rulings by alleging that ruling was that the "course of conduct" in paying bills early in the construction project amounted to a waiver or estoppel to dispute bills later on. Rather, the lower court simply and correctly applied a universal rule of construction of ambiguous contracts and evaluated that evidence and other evidence in finding the true intent and meaning of the parties. It is true that the trial court's finding of the meaning of the contractual arrangement did obligate the petitioner to pay the CIPRA billings, just as Kelley had properly paid the earlier billings. This obligation arose from contract, and not from estoppel or waiver.

The rulings of the trial court as to the basis for construing the ambiguous contractual arrangement were correct applications of the general principle of law relating to construction of ambiguous contracts, and review by this Court is not warranted.

III. THE PETITIONERS' ALLEGED REASON FOR GRANTING THE WRIT OF CERTIORARI, THAT IS TO DETERMINE WHETHER FEDERAL OR STATE LAW GOVERNS CONSTRUCTION OF FEDERAL MILLER ACT CONTRACTS, WAS NOT RAISED IN OR PRESENTED TO THE COURT OF APPEALS AND IS NOT A PROPER MATTER FOR REVIEW BY THIS COURT.

Although Kelley opposed the CIPRA billings for extras and on-the-job foreman at the trial of this case and in its appeal, this opposition was based primarily upon Kelley's alleged inadvertent and erroneous payment of early billings of CIPRA, and on Kelley's position as to the intent and meaning of the second-tier subcontract agreements. At no time in these proceedings, prior to the petition for writ of certiorari, did Kelley or Peerless assert that this was a Miller Act case in which federal substantive law controls in the interpretation and construction of the ambiguous contract. Petitioners do not in their Petition allege what this Court should state the federal substantive law to be as to the effect of evidence of conduct of the parties before dispute in construing an ambiguous contract.

In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), this Court stated:

In a short passage at the end of her brief to this Court, petitioner suggested that she has a valid ground for a new trial in the District Court's exclusion of opinion testimony by her witness concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40(1) (d) (2). See *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429, 84 S. Ct. 1555, 1557-1558, 12 L. Ed2d 423; *State of Califor-*

*nia v. Taylor*, 353 U.S. 553, 556-557, n.2, 77 S. Ct. 1037, 1039-1040, 1 L. Ed.2d 1034.

Where the Court of Appeals was not presented the issue of whether this was a Miller Act case and whether federal substantive law should control over state law in construing the contract, it is submitted the Court of Appeals could not render a decision meeting any of the criteria set forth in Rule 19(b) of the Supreme Court rules, setting forth considerations governing review on certiorari.

CIPRA submits this issue, asserted for the first time in the petition for certiorari, should not be considered by the Court in this case.

## CONCLUSION

There are no special or important reasons this diversity case should be reviewed by this Court. The petition should be denied.

Respectfully submitted,

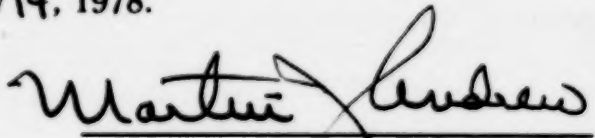
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## CERTIFICATE OF SERVICE

I, Martin J. Andrew, a member of the Bar of the Supreme Court of the United States and counsel of record for Cipra, Inc., respondent herein, hereby certify that on July 19, 1978, pursuant to Rule 33 of the Rules of the Supreme Court, I served the foregoing Brief of Respondent Cipra, Inc., in Opposition to Petition for Certiorari on Petitioners by depositing three copies thereof in the United States Mail at Denver, Colorado, with first class postage prepaid, addressed to each counsel of record for Petitioners: James R. Prochnow, Esq., Constantine and Prochnow, P.C., 5555 DTC Parkway, Englewood, Colorado 80110, for The M. J. Kelley Company; and Harmon S. Graves, Esq., Tilly & Graves, 50 South Steele Street, Suite 800, Denver, Colorado 80209, for the Peerless Insurance Company. All parties required to be served have been served.

DATED: July 19, 1978.



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Martin J. Andrew